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Supreme Court of the United States,

OCTOBER TERM, 1918.

No. 344.

WILLIAM H. SAGE, HENRY M. SAGE AND JAMES FENIMORE COOPER, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF DEAN SAGE, DECEASED,

v.

THE UNITED STATES.

BRIEF FOR APPELLANTS.

H. T. NEWCOMB,
Attorney for Appellants.

The Evening Post Job Printing Office, Inc., 156 Fulton St., N. Y.

CONTENTS.

	PAGE
SUMMARY OF FACTS ADMITTED BY THE DEMURRER	1
QUESTIONS OF LAW	3
STATUTES	3
ARGUMENT	5
Illegal collection admitted	5
Special demurrer, the	5
Merits of appellants' claim	6
Alleged prior adjudication	6
No judgment in favor of the United States	7
Judgments against collectors do not bind United States	9
Appropriation by Congress necessary.	9
Certificate of probable cause required.	10
Granting certificate discretionary	10
Estoppels must be mutual	11
Sovereign not bound by judgments against agents	11
Mutuality defined	14
Alleged bar of the statutes of limitation	15
Second section of Act of July 27, 1912, applies	15
Requirements of R. S. 3227 met	17
Requirements of R. S. 1069 met	18
Conclusion	19

CITATIONS AND REFERENCES.

	PAGE
Buttfield *v.* Stranahan, 192 U. S. 470	16
Carr *v.* United States, 98 U. S. 433	11, 12
Chesebrough *v.* United States, 192 U. S. 253.	8, 9
Danciger *v.* Cooley, 248 U. S. 319	16
Dunnegan's Case, 17 Ct. Cls. 274	9
Erskine *v.* Van Arsdale, 15 Wall. 75	8
Fidelity Trust Company *v.* United States, 45 Ct. Cls. 363; Reversed, 222 U. S. 158	16, 18
Frerichs *v.* United States, 21 Ct. Cls. 16; affirmed 124 U. S. 315	9
House Report No. 848, Sixty-second Congress, Second Session	16
James *v.* Hicks, 110 U. S. 272	17, 18
Jones *v.* United States, 49 Ct. Cls. 408; affirmed, 236 U. S. 106	18
Litchfield *v.* Goodnow's Administrator, 123 U. S. 549	14
McCoach *v.* Pratt, 236 U. S. 562	1, 5, 6, 17
Minnesota Co. *v.* St. Paul Co., 2 Wall. 609	14
Nixon *v.* United States, 18 Ct. Cls. 448	9
Patton *v.* Brady, Executrix, 184 U. S. 608	7, 8
Philadelphia *v.* The Collector, 5 Wall. 720	7
Philadelphia, Harrisburg and Pittsburg Railroad *v.* Lederer, Collector, 239 Fed. 184	8
Porterfield *v.* Clarke, 2 How. 76	14
Railroad Company *v.* National Bank, 102 U. S. 14	14
Reed *v.* Proprietors of Locks and Canals, 8 How. 274	11, 14
Roberts *v.* Lowe, Collector, 236 Fed. 604	8
Stacey *v.* Emery, 97 U. S. 642	10, 11
Stanley *v.* Schwalby, 162 U. S. 255	13
Thatcher *v.* United States, 149 Fed. 902	16, 18
The Daly Case, 26 Op. Atty. Gen. 194	16, 18, 19
The Davis, 10 Wall. 15	12
The Delaware, 161 U. S. 459	16
The Siren, 7 Wall. 152	12

	PAGE
Tillson *v.* United States, 100 U. S. 43	8
Tindall *v.* Wesley, 167 U. S. 204	13
Tregea *v.* Modesto Irrigation District, 164 U. S. 179	14
United States *v.* Abattoir Place, 106 U. S. 160.	10
United States *v.* California Bridge Co., 245 U. S. 337	9
United States *v.* Emery, Bird, Thayer Realty Company, 237 U. S. 28	8
United States *v.* Hvoslef, 237 U. S. 1	9, 15, 16, 17, 18
United States *v.* Jones, 236 U. S. 106	5, 6
United States *v.* Lee, 106 U. S. 196	12, 13
United States *v.* Shipley, 197 Fed. 265	18
Wright *v.* Blakeslee, 101 U. S. 174	17

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v.

THE UNITED STATES.

BRIEF FOR APPELLANTS.

This is an appeal from a judgment of the Court of Claims which sustained defendants' special demurrer (*R. 11*) to appellants' amended petition (*R. 1–11*), and, thereupon, dismissed their suit (*R. 11*).

Summary of Facts Admitted by the Demurrer.

The sum sought to be recovered is the unrecovered **balance of a payment illegally exacted** (*McCoach* v. *Pratt*, *236 U. S. 562*), under color of the legacy tax provisions of the Act of Congress of June 13, 1898, and amendments.

Appellants are the duly appointed, qualified and acting executors of the will of Dean Sage, deceased, and sued the United States, in the Court of Claims, under the Act of July 27, 1912 (*37 Stat. 240*) to re-

cover $33,665.39, the unrecovered balance of the sum of $63,940.88 exacted from the estate represented by them, under color of the legacy tax provisions of the Act of June 13, 1898 (*30 Stat. 448, 464–5*) and amendments.

Dean Sage, a citizen of the United States and of the State of New York and a resident of Albany county, New York, died testate on June 23, 1902 (*R. 3*), and his will was duly admitted to probate and letters testamentary duly issued to appellants on July 9, 1902 (*R. 3*).

On July 1, 1902, the amount of the debts of said decedent, due and payable out of his said estate, had not been and could not have been ascertained; what, if anything, would remain out of his said estate for the satisfaction of legacies had not been and could not have been ascertained; the time for the payment of legacies, if funds should remain for that purpose, had not arrived, and the net, actual, clear value of the said estate and of the interests therein, or any of them, had not and could not have been ascertained (*R. 4*).

The sum of $63,940.88 was exacted, and paid to the United States Collector of Internal Revenue for the Fourteenth District of New York, under protest, on June 25, 1903, and in the ordinary course of business of said Collector was turned over to the defendants (*R. 4*).

Claim for refund of the whole of this $63,940.88 was filed with the Commissioner of Internal Revenue on August 24, 1903, and rejected on September 24, 1903, and on September 19, 1905, appellant sued John G. Ward, the Collector of Internal Revenue who had exacted the payment, in the Circuit Court of the United States for the Northern District of New York, for the whole of said $63,940.88 (*R. 4*).

Judgment, was rendered in this proceeding, against said Ward, for $30,275.49, a part of said

$63,940.88, with interest and costs, and this judgment was satisfied by defendants (*R. 4-5*).

On September 7, 1916, application was made to the Secretary of the Treasury for the refund of the balance of $33,665.39, out of said $63,940.88, and this application was rejected on October 30, 1916 (*R. 5*), the ground for such rejection being stated (*R. 5*) as follows:

> "A claim for the refund of $63,940.88, the entire amount of tax paid, was rejected September 24, 1903. Subsequent to the rejection of this claim suit was brought for the recovery of the amount claimed in the U. S. Circuit Court for the Northern District of New York, and a judgment in amount of $30,275.49, together with interest and costs, was rendered. Since any rights the claimants might have had under recent decisions of the Supreme Court were merged in this judgment, the claim is rejected."

The original petition was filed in the Court of Claims on January 23, 1917 (*R. 1*).

Questions of Law.

The special demurrer set up that the suit was barred by a prior adjudication and by either the limitation provided by R. S. 3227 or R. S. 1069. It was sustained, without opinion, by the Court of Claims, and the petition dismissed. Appellants contend that the Court of Claims erred in not overruling the demurrer.

Statutes.

Act of June 27, 1902 (*32 Stat. 406*) is printed in the Record (*p. 2*).

Act of July 27, 1912 (*37 Stat. 240*) is printed in the Record (*p. 3*).

R. S. 989 is printed in this brief at page 10.

R. S. 1069 is as follows:

> "Every claim against the United States, cognizable by the Court of Claims, shall be forever

barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives as provided by law, within six years after the claim first accrues: *Provided*, That the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively."

R. S. 3227 is as follows:

"No suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, shall be maintained in any court, unless the same is brought within two years next after the cause of action accrued: *Provided*, That actions for such claims which accrued prior to June six, eighteen hundred and seventy-two, may be brought within one year from said date; and that where any such claim was pending before the Commissioner, as provided in the preceding section, an action thereon may be brought within one one year after such decision and not after. But no right of action which was already barred by any statute on the said date shall be revived by this section."

Argument.

Defendant's special demurrer (*R. 11*) in the Court of Claims admitted the substantial allegations of the petition. In other words, it admitted that Dean Sage died, testate, only a week before the repeal of Section 29 of the Act of June 13, 1898 (*R. 3*); that on the date of the repeal letters testamentary had not issued (*R. 3*), the time for payment of legacies had not arrived (*R. 4*), the value of the estate and the amount of the debts and expenses of administration had not been ascertained (*R. 4*), what if anything would remain for the satisfaction of legacies had not been determined (*R. 4*).

Hence, at the outset, it must be noted that THIS SUIT RESTS UPON THE SOLID FOUNDATION OF THE ILLEGALITY OF THE EXACTION (*United States* v. *Jones, 236 U. S. 106; McCoach* v. *Pratt, 236 U. S. 562*) against which relief is sought. *The demurrer admits, in effect, that the amount sued for was illegally taken from appellants, that it is in the Treasury of the United States without warrant of right and to the injury of appellants and the estate they represent.*

But, these admissions notwithstanding, *appellees contend that the technical situation in which appellants now find themselves is such that the wrong to which they were subjected must remain unredressed.* They argue that the sum which they unlawfully took must be forever withheld from those to whom Congress voted that it should be repaid (*Acts of June 22, 1902, and of July 27, 1918*) because, as they assert, there is no power to order otherwise. The technical objections they assign (*R. 11*) are:

1. That there is a *prior adjudication* which constitutes an estoppel, and

2. That this suit was not brought within the time prescribed by R. S. 3227 or at least R. S. 1069.

While technical defences can be no stronger than the technical situations on which they rest, it will be necessary to consider whether these objections can be sustained upon the facts of the instant proceeding. They will be considered separately.

Merits of Appellants' Claim.

First, however, it will be well to outline the position of appellants as to the merits of this claim. It runs like this:

1. The Act of June 27, 1902, by the last sentence of Section 3 (*R. 2*), prohibited the collection of any tax in respect of any contingent beneficial interest not vested in possession or enjoyment prior to July 1, 1902.

2. The sum now sued for was collected, after June 27, 1902 (*R. 4*), in respect of such unvested contingent interests (*R. 4; United States* v. *Jones, 236 U. S. 106; McCoach* v. *Pratt, 236 U. S. 562*).

3. Hence the sum sued for herein was illegally collected.

4. The Act of July 27, 1912, by its second section (*R. 3*), directed the Secretary of the Treasury to refund such erroneously collected sums in every case of claim therefor made not later than January 1, 1914, whether such claim were made before or after the enactment of the refunding law.

Alleged Prior Adjudication.

The facts concerning the former suit, as alleged in the petition and admitted by the demurrer, are:

"On or about September 19, 1905, your petitioners brought suit in the United States Court for the Northern District of New York against

John G. Ward, as the said Collector, for the recovery of said $63,940.88, and in said suit your petitioners subsequently, on or about May 17, 1912, obtained judgment against said John G. Ward in the sum of $30,275.49, with interest and costs, which said judgment was satisfied by the United States." *R. 5-6.*

No judgment in favor of the United States.

Appellants contend that they are entitled to maintain this suit *despite a judgment in favor of one John G. Ward, who was the Collector of Internal Revenue and the defendant* in a former proceeding. That is, the instant suit refers to a part of the sum that was claimed, as against Ward, in the prior suit, but as to which the judgment was in his favor, *upon grounds not disclosed by this record.* Appellees contended, in the lower court, that the judgment referred to

> " was in effect a judgment against the United States." *Defendant's brief in Court of Claims, p. 19.*

The question first presented, therefore, is:

> *Does the judgment in favor of Ward, as to the portion of the original payment now claimed, constitute an estoppel of which the United States may avail themselves in the instant proceeding?*

The proceeding against Ward was a common law action; *the present suit is to enforce a right conferred by the Act of July 27, 1912.*

> " Appropriate remedy to recover back money paid under protest on account of duties or taxes erroneously or illegally assessed is an action of assumpsit for money had and received." *Philadelphia* v. *The Collector, 5 Wall. 720, 731; Cited with approval, Patton* v. *Brady, Executrix, 184 U. S. 608, 614.*
>
> " The right to sue the Collector for an unjustified collection was given by the Common Law.

> "The jurisdiction over suits against the United States under Section 24, Twentieth of the Judicial Code, extends to all 'claims . . . founded upon . . . any law of Congress.'" *United States* v. *Emery Bird, Thayer Realty Company, 237 U. S. 28, 31.*

This distinction has one of its results in the rule that plaintiffs prevailing in such a suit as that brought against Ward may recover interest (*Erskine* v. *Van Arsdale, 15 Wall. 75*), *while in the present suit interest cannot be recovered* (*Tillson* v. *United States, 100 U. S. 43*).

Moreover, it would seem that the *technical defense* of prior adjudication must rest upon the *technical* character of the prior suit. Of course it was not *technically* a suit against the United States. It could be entertained in the Circuit Court only *because it was not against the United States.*

The suit against Ward was a personal action and in case of his death before it was brought the right of action would have survived against his personal representatives. It was so held in a similar case:

> "It matters not whether we consider the common law or the statute law of Virginia as controlling. By either the cause of action stated in the complaint survived the death of defendant." *Patton* v. *Brady, Executrix, 184 U. S. 608, 612.*

Such suits can be maintained only against the individual who, as collector, exacted the tax, and his personal representatives, in case of his decease, not against his successors in office:

> *Philadelphia, Harrisburg and Pittsburgh Railroad* v. *Lederer, Collector, 239 Fed. 184;*
> *Roberts* v. *Lowe, Collector, 236 Fed. 604.*

Ward was entitled to many defenses, including that of voluntary payment (*Chesebrough* v. *United*

States, 192 U. S. 253, 259), not open to the defendants in this proceeding (*United States* v. *Hvoslef, 227 U. S. 1*). This distinction as to defenses is important (*United States* v. *California Bridge Company, 245 U. S. 337, 341*).

Judgments against collectors do not bind United States.

Judgments against collectors of internal revenue are not binding upon the United States; but, before payment out of the Treasury, it is necessary (1) that the trial court award a certificate of probable cause under R. S. 989, and (2) that the Commissioner of Internal Revenue allow a claim under R. S. 3220.

Frerichs v. *United States, 21 Ct. Cl. 16; affirmed, 124 U. S. 315;*
Dunnegan's Case, 17 Ct. Cl. 247.

Appropriation necessary.

Even after these requirements have been fully met, the judgment cannot be paid until Congress, in its discretion, has made an appropriation for that purpose. The Secretary of the Treasury may be compelled to certify the allowance to the Speaker of the House of Representatives but the legislative discretion is, of course, beyond control.

Whether a claim for such a judgment shall be allowed may be discretionary with the Commissioner of Internal Revenue:

> "This was a matter wholly for the consideration of that officer. He would not have been bound to make the allowance, if all the public officers mentioned had been notified, and had appeared and defended the suit; and, on the other hand, if he saw fit in the exercise of that sound discretion to which Congress has entrusted the power, he might allow the repayment of the amount of the judgment, without previous notice of the pendence of the suit to himself or to any other officer of the Government." *Nixon* v. *United States, 18 Ct. Cl. 448, 456.*

Certificate of probable cause required.

Section 989, of the Revised Statutes, the only statute purporting to make such a judgment in any way a charge upon the Treasury of the United States, is as follows:

> "Sec. 989. When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his official duty, *and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government*, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury."

Granting certificate discretionary.

Attention is especially requested to the clause which has been set out in italics. *The defendants evidently assume that if the judgment in the prior suit had been against Ward, as to the amount sued for in the case at bar, a certificate of probable cause would have been accorded. There is no foundation for such an assumption.* The judgment was in favor of Ward and the question did not arise but, whenever it does arise, it is left to the discretion, *the unreviewable discretion*, of the trial judge.

> "We are of the opinion that the refusal of the District Court to grant a certificate of reasonable cause is not a matter which can be reviewed in the Circuit Court or in this Court." *United States* v. *Abattoir Place, 106 U. S. 160.*

The terms "reasonable cause" and "probable cause" have identical meaning.

> "The authorities we have cited speak of 'probable' cause. The statute of 1799, how-

ever, uses the words 'reasonable cause of seizure.' No argument is made that there is a substantial difference in the meaning of these expressions, and we think there is none. If there was a probable cause of seizure, there was a reasonable cause. If there was a reasonable cause of seizure, there was a probable cause." *Stacey* v. *Emery*, *97 U. S.*, *642*.

Estoppels must be mutual.

The foregoing would apparently suffice but *there is another serious obstacle* to considering that a judgment against Ward for the amount claimed in this suit would have bound the present defendants. ESTOPPELS MUST BE MUTUAL (*Reed* v. *Proprietors of Locks and Canals*, *infra*, *14*). *The sovereign character of the United States renders them exempt from suits save by their consent and to the extent and in the manner prescribed by their statutes.* Such exemption would be worthless and the sovereignty merely nominal if an action against an officer could bind the Government. Judgment against Ward in the prior suit, as to the amount involved in the present case, would not have bound the United States. They were not bound by the judgment that was rendered and the officers of the Treasury Department were not *at liberty* to pay it, as already shown (*supra*, *9–11*), unless certificate of probable cause issued and even with such certificate were not *bound* to pay (*supra*, *9*).

Sovereign not bound by judgments against agents.

In *Carr* v. *United States*, *98 U. S. 433*, this Court held that the United States were not bound by judgments in ejectment against their agents, claiming to hold under them, even in a case in which the possession of the agents had been defended by coun-

sel chosen and paid by the United States. The Court said, in part:

> "The appellant contends that this was sufficient to make the United States a virtual party to said actions, and to conclude them by the judgment therein; that by the law of California a judgment in ejectment is an estoppel; and that where a tenant, or other person in privity, with the landlord, is sued, and notifies the landlord to defend, the landlord is bound by the judgment pronounced in the action; . . .
>
> "Whilst we concede that this may be the law of California as it regards private citizens who are landlords, we are not satisfied that the same law can be applied to the government of the United States. We consider it to be a fundamental principle that the Government cannot be sued except by its own consent; and certainly no State can pass a law which would have any validity, for making the Government suable in its courts. It is conceded in the case of *The Siren* (*7 Wall. 152*) and in that of *The Davis* (*10 Wall. 15*), that without an act of Congress no direct proceeding can be instituted against the Government or its property.
>
> . . . . . .
>
> "Without discussing the matter further, we are clearly of opinion that the judgments in the cases relied on by the appellant constitute no estoppel against the United States." *98 U. S. 433, 437-9.*

In *United States* v. *Lee*, *106 U. S. 196*, Mr. Justice Miller, speaking for the majority of the Supreme Court said:—

> ". . . since the United States cannot be made a defendant to a suit concerning its property, and no judgment in any suit against an individual who has possession or control of such property can bind or conclude the Government, as is decided by this Court in the case of *Carr* v. *United States*, already referred to, the Government is always at liberty, notwithstanding any such judgment, to avail itself of all the

remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights." *United States* v. *Lee*, *106 U. S. 196.*

and the opinion continues:—

"Hence, taking the present case as an illustration, the United States may proceed by a bill in chancery, to quiet its title, in aid of which, if a proper case is made, a writ of injunction may be obtained. Or it may bring an action of ejectment, in which, on a direct issue between the United States as plaintiff and the present plaintiff as defendant, the title of the United States could be judically determined." *106 U. S. 196.*

To realize the full import of the foregoing it is necessary to bear in mind that it was said in affirming a judgment in ejectment against officers of the United States and in a proceeding in which the plaintiffs in error were represented by the Solicitor General of the United States.

In *Tindall* v. *Wesley*, *167 U. S. 204*, the following was said:

"It is said that the judgment in this case may conclude the State. Not so. . . . The State not being a party to the suit, the judgment will not conclude it. Not having submitted its rights to the determination of the court in this case, it will be open to the State to bring any action that may be approriate to establish and protect whatever claim it has to the premises in dispute. Its claim, if it means to assert one, will thus be brought to the test of the law as administered by tribunals ordained to determine controverted rights of property; and the record in this case will not be evidence against it for any purpose touching the merits of its claim." *167 U. S. 204, 223.*

To the same effect see:

Stanley v. *Schwalby*, *162 U. S. 255, 271.*

Mutuality Defined.

The defense of prior adjudication protects no one unless it would have protected the opposed party had the result of the prior suit been different.

> "All estoppels are mutual; . . ." *Reed* v. *Proprietors of Locks and Canals, 8 How. 274, 290.*
>
> "Had the judgment been, that no patent issue to George Rogers Clarke, then he would have been estopped to controvert the superior right of the superintendents. If he would have been estopped, so were the superintendents, on the judgment being the other way. *4 Yerg. 333.* Estoppels are mutual." *Porterfield* v. *Clarke, 2 How. 76, 109.*
>
> "It would not even bind complainants *because there would be no mutuality* in the estoppel. It is an impeachment of the legal attainments of the court and of the counsel to suppose that they would make a reference to a master to ascertain a fact which could have no influence on the suit, and if passed upon by the court, could affect nobody's interests in the slightest degree." *Minnesota Co.* v. *St. Paul Co., 2 Wall. 609, 637.*

In *Litchfield* v. *Goodnow's Administrator, 123 U. S. 549*, the plaintiff-in-error had sought the protection of a plea of prior adjudication against a suit brought by the assignee of the Homestead Company. Mr. Chief Justice Waite, for the Court, said:

> "As she was not bound, the Homestead Campany was not bound and its assigns were not. *Estoppels to be good must be mutual.* This was in effect the decision of the Court below, and it was right." *123 U. S. 549, 552.*

See also:

Railroad Company v. *National Bank, 102 U. S. 14, 21-2.*

Tregea v. *Modesto Irrigation District, 164 U. S. 179, 188.*

The plea of prior adjudication, in the instant case, should not be sustained because (1) appellants are entitled to the benefits of the Act of Congress of July 27, 1912, adopted over two months after May 17, 1912, the date on which the judgment in the former suit was rendered (*R.*, *5*); (2) the appellees were not defendants in the former suit; (3) the appellees would not have been bound had the judgment in the former suit been against Ward as to the portion of the tax now sued for, and (4) there could not be that mutuality of relationship necessary to support the plea.

Alleged Bar of the Statutes of Limitations.

This suit is to enforce a right conferred upon appellants by the Act of Congress of July 27, 1912. That Act provided an extension of the period during which claims for taxes illegally assessed or collected under the Act of June 13, 1898, and amendments might be presented and that period terminated with January 1, 1914. All this is found in the first section of the Act of July 27, 1912, *and appellees have apparently given their attention to that section to the exclusion of the second section.*

Second section of Act of July 27, 1912, applies.

It is under the second section that the instant suit was brought and this section authorizes and directs the Secretary of the Treasury—

> "to pay . . . to such claimants as HAVE PRESENTED . . . their claims, and shall establish such erroneous or illegal assessment and collection, any sums paid by them or on their account or in their interest to the United States under the provisions of the Act aforesaid." *Section 2, Act of July 27, 1912.*

This mandate created rights very similar to those raised by the Act of June 27, 1902 (*32 Stat. 406*), which has been repeatedly considered by the courts (*United States* v. *Hvoslef*, *237 U. S. 1*). The

sole difference, except as to subject matter, being that while the Act of June 27, 1902, was made to apply to all payments of the class designated irrespective of the time of application therefor (*Fidelity Trust Company* v. *United States, 45 Ct. Cl. 363, 366-7; The Daly Case, 26 Op. Atty-Gen. 194, 197; Thatcher* v. *United States, 149 Fed. 902, 903-4; United States* v. *Hvoslef, 237 U. S. 1, 11*), the Act of July 27, 1912, applies only to payments as to which claims were filed not later than January 1, 1914. By expressly providing for claimants who "*have presented*" all claims filed prior to the enactment were revived for lawful consideration.

But in all cases of—

> "erroneous or illegal assessment and collection"

the Act of July 27, 1912, requires nothing *except that the claim should be made not later than January 1, 1914.* It might be filed after the enactment or, *in cases in which claims had previously been filed, they were revived by the Act and the Secretary of the Treasury was directed to refund* on the establishment of the fact of erroneous or illegal assessment and collection. No discrimination was made among or against claims previously filed. Congress was aware, when the Act of July 27, 1912, was adopted, that there were many claims on file in the Treasury Department and that many of them had been rejected upon grounds which had subsequently been condemned by the Courts. This is shown by the Committee report recommending the enactment. *Report of Committee on Judiciary, of the House of Representatives, House Report No. 848, Sixty-Second Congress, Second Session.*

Such reports are competent evidence of the intention of Congress:

> *Buttfield* v. *Stranahan, 192 U. S. 470.*
> *The Delaware, 161 U. S. 459.*
> *Danciger* v. *Cooley, 248 U. S. 319, 325.*

Hence, the *second section* of the Act of July 27, 1912, was made to run in favor of "such claimants as *have presented*" as well as those who "shall hereafter so present". The broad scope of the Congressional purpose thus expressed must have been overlooked or appellees could not have suggested, to the Court below, their second technical defense, namely, that this suit was barred by the limitation of R. S. 3227 (which provides that all suits for the refund of internal revenue taxes must be brought within two years from the accrual of the right of action) or, if not, by R. S. 1069 (which requires that suits in the Court of Claims must be brought within six years from the accrual of the right).

Requirements of R. S. 3227 met.

The first of the statutes thus referred to is probably not applicable (*United States* v. *Hvoslef, 237 U. S. 1*), but if it is applicable it is believed that the cause of action which it intends did not accrue until October 30, 1916 (*R. 5*). See *James* v. *Hicks, 110 U. S. 272; Wright* v. *Blakeslee, 101 U. S. 174.* Suit was brought within the six years prescribed by R. S. 1069. Claimants filed claim for the refund of the whole $63,940.88, *all of which was illegally collected as is now admitted by appellees*, on September 24, 1903. This claim was rejected (*R. 4*). It was, however, a claim presented prior to the passage of the Act of July 27, 1912, and, therefore, appellants were among those who "have presented" and so within the benefits of that Act. They were of those who "have presented," referred to in the second section. As *they had presented within the time limited*, they were justified in supposing that, in due course, their claim, which had been revived by the statute, would be considered and the proper amount refunded without further action upon their part. Their money having been illegally taken (*McCoach* v. *Pratt, 236 U. S. 562*), they had no reason to anticipate an adverse attitude on the part of the adjudicating officers and were

under no obligation to press for immediate allowance or for earlier consideration than the convenience of the departmental authorities might indicate. However, on September 7, 1916 (*R. 5*), they did appeal for the payment to which they considered themselves entitled, and on October 30, 1916 (*R. 5*), they were advised that *the Treasury Department held that the judgment in the suit against Ward required the United States to retain the moneys illegally taken from them.* Their cause of action accrued on the date of this rejection (*James* v. *Hicks, 110 U. S. 272; Wright* v. *Blakeslee, 101 U. S. 174*). Promptly thereafter, that is to say on January 23, 1917, the original petition in this suit was filed (*R. 1*). *This was within two years from the refusal of the Treasury Department to make the refund and less than six years from the passage of the Act of July 27, 1912*, which granted the right of refunder which they seek, by this proceeding, to enforce. Section 3227, which fixes the two years' limitation upon suits to recover taxes, has been satisfied, although it probably does not apply to a suit to enforce the gift provided for by the second section of the Act of July 27, 1912, and this is such a suit.

United States v. *Hvoslef, 237 U. S. 1, 14;*
Jones v. *United States, 49 Ct. Cls. 408;*
Fidelity Trust Co. v. *United States, 45 Ct. Cls. 363;*
The Daly Case, 26 Op. Atty. Gen. 194;
Thatcher v. *United States, 149 Fed. 902;*
United States v. *Shipley, 197 Fed. 265, 273.*

R. S. 1069.

The six-years period fixed by R. S. 1069 probably commenced to run with the rejection of October 30, 1916. *At the most it could not have begun to run earlier than July 27, 1912*, the date on which the statutory right to refund was created. The better view, however, would seem to be that the benefit could be demanded, by one who had made claim before or after the enactment but not later than Janu-

ary 1, 1914, at any time—*See the Daly Case, 26 Op. Atty. Gen. 194.*

It is concluded that, (1) if the two years' statute of limitations (*R. S. 3227*) applies the cause of action, which sets it in motion, did not accrue until the adverse decision of the Secretary of the Treasury on October 30, 1916 (*R. 5*), less than three months before suit was brought, while (2) if the six years statute (*R. S. 1069*) applies, the claim which would start it in motion did not arise, at the earliest, until Congress directed the refund, that is, on July 27, 1912.

Conclusion.

The foregoing considered, it appears that appellants are under no technical disabilities which need constrain this Court to deny to them the tardy justice, all they can now receive, of a return, without interest, of the balance of the sum illegally exacted from them, substantially sixteen years ago.

The judgment should be reversed.

All of which is respectfully submitted,

H. T. NEWCOMB,
Attorney for Appellants.